STATE OF MICHIGAN

COURT OF APPEALS

BRYAN MICHAEL RACZKOWSKI, Plaintiff/Counter-Defendant-Appellant,	UNPUBLISHED November 14, 2013
v	No. 313423 Mason Circuit Court
ASHLEY DAWN CORRELL, f/k/a ASHLEY DAWN RACZKOWSKI, Defendant/Counter-Plaintiff-Appellee.	LC No. 07-000354-DM

Before: SAAD, P.J., and K. F. KELLY and GLEICHER, JJ.

K. F. KELLY, J. (*concurring in part and dissenting in part*).

While I concur with the lead opinion's conclusion that any error surrounding the determination of the child's custodial environment was harmless, I cannot agree that the trial court erred in its factual findings as to the best interest factors set forth in MCL 722.23. Because the trial court's factual findings were not against the great weight of the evidence and the trial court properly exercised its discretion on the ultimate custody issue, I would affirm. In ordering that the matter be reversed, I believe that the lead opinion fails to give proper deference to the trial court's thoughtful and deliberate consideration of the factual issues surrounding this custody dispute.

I. PROPER STANDARD OF REVIEW

Under the great weight of the evidence standard, a trial court's determination as to each of the best interest factors should be affirmed and "a reviewing court should not substitute its judgment on questions of fact unless the factual determination clearly preponderates in the opposite direction." *Pierron v Pierron*, 486 Mich 81, 85; 782 NW2d 480 (2010) (internal quotation marks removed). As best explained by Justice Brickley:

> The Child Custody Act provides that findings of fact in child custody cases are reviewed under the "great weight of evidence" standard. When the Legislature enacted the custody act it presumably used the phrase, "against the great weight of evidence," with knowledge of its existing meaning and with intent that the phrase maintain its existing meaning. "Against the great weight of evidence" was defined by *Murchie v Standard Oil Co*, 355 Mich 550, 558; 94

> NW2d 799 (1959). The Court explained that a reviewing court should not substitute its judgment on questions of fact unless they "clearly preponderate in the opposite direction." The court should review "the record in order to determine whether the verdict is so contrary to the great weight of the evidence as to disclose an unwarranted finding, or whether the verdict is so plainly a miscarriage of justice as to call for a new trial...." *Id*.
>
> Although the great weight standard traditionally is applied in the context of granting and denying new trials, the Legislature's adoption of that standard for appellate review of child custody orders reasonably furthers its express intent to: "expedite the resolution of a child custody dispute by prompt and final adjudication...." *In custody trials, the trial judge is the finder of fact. Thus, when an appellate court reviews a trial judge's findings, it acts as the functional equivalent of a trial judge reviewing the findings of a jury*. Therefore, the great weight standard, which is the standard by which jury findings are reviewed, is also a logical standard by which to review findings of a trial judge. The great weight standard of review allows a meaningful yet deferential review by the Court of Appeals. A more deferential standard, such as "insufficient evidence" or "supported by competent, material, and substantial evidence," could effectively immunize the trial judge's fact finding in contravention of a child's best interests.
>
> In the context of child custody cases, there are findings of ultimate facts, i.e., a finding regarding each factor, and there are findings of ordinary or evidentiary facts. The great weight of the evidence standard applies to all findings of fact. *Thus, a trial court's findings on each factor should be affirmed unless the evidence "clearly preponderates in the opposite direction." Murchie, supra* at 558[]. [*Fletcher v Fletcher*, 447 Mich 871, 878-879; 526 NW2d 889 (1994) (emphasis added; footnote and some citations omitted).]

In determining whether the great weight of the evidence supports a trial court's findings, this Court "defer[s] to the trial court's credibility determinations given its superior position to make these judgments." *Shann v Shann*, 293 Mich App 302, 305; 809 NW2d 435 (2011).

The lead opinion, in repeatedly substituting its own judgment for that of the trial court in this case, fails to adhere to this standard.

II. FACTORS (D) AND (E)

MCL 722.23(d) requires a trial court to consider, evaluate and determine: "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity." As to this factor, the trial court concluded:

> [The child] lived with her mother up until February 2011 when her sister died. There were apparently no problems up until that time that prompted the father to take any action to alter the custody arrangement. The father has a wife who has two children from a previous relationship and a son together. There was no

> testimony that the father's home is an inappropriate environment. This fact is equal.

MCL 722.23(e) requires a trial court to consider, evaluate and determine: "[t]he permanence, as a family unit, of the existing or proposed custodial home or homes." The trial court concluded:

> [t]he father is has [sic] been in a relationship with his wife since 2007 and the mother has been in a relationship with her boyfriend for approximately two years. The Department of Human Services has overseen the residences of both and it was testified to that both are appropriate. This factor is equal.

The lead opinion analyzes these two factors together and concludes that "[t]he great weight of the evidence supports that Correll's living arrangements were markedly less stable than those of Raczkowski," focusing on the number of homes the mother lived in following the parties' separation. *Infra*, p 19. The lead opinion concludes that:

> These facts do not support the trial court's conclusion that the parties' home presented equal opportunities for permanence or stability. Correll's frequent moves and the apparent impermanence of her relationships contrast markedly with the stability and continuity of Raczkowski's home environment. Furthermore, Correll's decision to remain with McCarthy potentially subjected her to further scrutiny by the DHS, as explained by the DHS caseworkers. [*Infra*, pp 19-20.]

The lead opinion cites "apparent impermanence of [the mother's] relationships" and, in the very same breath acknowledges the permanence of the mother's relationship with Matt, which the lead opinion finds untenable under the circumstances. Additionally, although the lead opinion worries about whether DHS would take additional steps against the mother, the court in Montcalm dismissed the juvenile case and the child was no longer a temporary ward. Moreover, as will be discussed at further length below, the trial court had assured itself that the child was not at risk of harm in her mother's care regardless of the mother's continued relationship with Matt.

The trial court's findings were not against the great weight of the evidence. The evidence clearly supported a finding that the child enjoyed a stable and loving situation with her mother before HH's untimely death and the resultant proceedings. The evidence further supported a finding that the mother had enjoyed a stable environment for the preceding two years. Factor (e) focuses on the permanence, not the acceptability, of the home. *Ireland v Smith*, 451 Mich 457, 464; 547 NW2d 686 (1996). The trial court apparently "discern[ed] no significant difference between the stability of the settings proposed by the two parties." *Id.* at 465. It is not for us to second-guess a finding for which there is record evidence.

III. FACTOR (G)

MCL 722.23(g) requires a trial court to consider, evaluate and determine: "[t]he mental and physical health of the parties involved." The trial court found as follows:

> The testimony provided that both parties are in good physical health and there was testimony regarding the mental health of the mother. The mother's counselor, Sue Pabst, testified that she diagnosed the mother with post-traumatic stress disorder. It is of no surprise to this court that a parent who suffers the deaths of two young children within a 12 month period of time would be so diagnosed. Counselor Pabst said that the deaths of her children together with the legal proceedings which followed "compounded her problems". The mother called this counselor in May of 2011 voluntarily and she said the mother has made good progress in dealing with the trauma in her life and that she had no concerns with Olivia being back in her mother's care. The dispositional review order issued by the Montcalm County Probate [Court] following its hearing on May 7, 2011, provides in paragraph 8 that the mother "has complied with the case service plan date 2-7-12 and met all recommendations contained in her psychological evaluation and shall continue to attend individual counseling with Transitions". The court also ordered that there would be no case service plan for the mother at this time and the court commented in the transcript marked Exhibit 5 that "no case service plan has been ordered for several months now". Apparently, DHS was not concerned that any psychological issues continued to exist. This factor is equal.

The lead opinion disagrees with this assessment of the evidence:

> The great weight of the evidence contradicts the trial court's finding that the DHS lacked concerns regarding Correll's "psychological issues" and that Pabst had given Correll a clean bill of mental health. Szczerowski specifically expressed "concerns . . . based on my review of the psychological assessment and the emotional stability and the lack of counseling that she has attained." Syjud testified that although the probate court ceased ordering Correll to comply with her service plan, the DHS continued to recommend that she participate in counseling and in random drug screening based on her history of getting drunk or high on a weekly basis. Pabst, too, recognized that Correll had a history of drinking to excess. Although Correll had made therapeutic gains, Pabst recommended continued counseling. No evidence supported that Raczkowski suffered from any physical or emotional health problems.
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> While the trial court apparently found Pabst more credible that Syjud or Szczerowski, even Pabst's testimony support that Correll's on-going emotional issues remained unresolved and that she needed additional therapy. The great weight of the evidence contradicted the trial court's conclusion that Correll had no ongoing psychological problems, thus render the parties equal on this factor. [*Infra*, pp 21-22.]

This is an example of the lead opinion substituting its judgment for the trial court. The lead opinion clearly concedes that the trial court credited Pabst's testimony. Instead of stating that Pabst's testimony was not worthy of belief (because the lead opinion cannot make such credibility determination), the lead opinion misstates Pabst's testimony and suggests the

testimony somehow buttresses the testimony of the case workers. Nothing could be further from the truth.

First, the mother's alleged substance abuse is a red herring. The mother and Pabst both acknowledged that the mother had fallen into a pattern of drinking to excess on Thursdays. There is absolutely no record evidence that the mother failed to heed her counselor's advice and refrain from doing so.

Second, the trial court judge expressly questioned Pabst about the workers' concerns that the mother did not participate in Dialectical Behavioral Therapy:

> THE COURT: Okay. This Dialectical Therapy.
>
> THE WITNESS: Dialectical Behavioral Therapy, DBT.
>
> THE COURT: One of the witnesses from DHS, Jessica Szczerowski, something along those lines, she, she testified that it addressed day-to-day issues, individual and group therapy; does that sound accurate?
>
> THE WITNESS: It's, it can be a part of Dialectical Behavioral Therapy. It's pretty popular in Community Mental Health.
>
> THE COURT: And she also indicated that, that the mother, Ashley, said she resisted or refused to participate because she didn't agree with the psychological exam.
>
> They were disappointed that she didn't take part in this Dialectical Therapy, but you're saying that it's the wrong medicine basically, aren't you?
>
> THE WITNESS: I mean I've not saying that it wouldn't have been at all effective, but it wasn't, certainly wasn't what I thought that she, the type of modality that I thought she needed.
>
> THE COURT: It wouldn't be your first choice of therapy then?
>
> THE WITNESS: It would not.
>
> THE COURT: Okay. And then –
>
> THE WITNESS: And –
>
> THE COURT: -- and why is that?
>
> THE WITNESS: Because I'm dealing with PTSD and not Borderline Personality Disorder.

Third, the trial court in no way gave the mother "a clean bill of health." Pabst did not express that the mother was fully healed; she only reiterated her opinion that the mother posed no risk to the child:

Q. [by mother's attorney]. And in your opinion is there some point in therapy that she needs to get to in order for Olivia to be safe in her care?

A. Olivia's always been safe in her care.

Q. Okay. Do you have any concerns about, given Ms. Correll's mental status, do you have any concerns about Olivia being safe in her care?

A. None.

Q. Do you, have you seen any evidence of any psychotic feature or psychotic behavior from Ashley?

A. No.

Q. And are any of her, her mental health diagnosis, anything that would negatively affect her ability to parent her child?

A. I'm thinking. I don't see it, no.

Q. Do you have concerns that Ashley has any substance abuse addiction problems?

A. No.

Q. Is that a concern at all for Ashley?

A. Had it been, or is it now?

Q. Is it now?

A. No.

Q. And what do you recommend for Ashley's further treatment?

A. She's going to be having to grieve this for a long time so it's I really work off of the belief system that therapy works best when it is voluntary. And so we have really kept that very loose as far as when as needed type of thing. So she's been very free and willing to always make contact when hard things come up. I don't want to create a dependence therapeutically either, but she's probably got a good two years of kind of coming in for basic check-ins if you will.

The mere fact that the mother will undoubtedly need to continue with therapy does not, in and of itself, compel a finding that her mental health was a serious concern. Had the mother's trauma gone untreated, that would be another story.

Finally, the trial court personally questioned Pabst at length about DHS's concern that the mother continued her relationship with Matt. Given the "backdrop [of this case] does that cause, would you [be] concern[ed] as a therapist about the proper discharge of protecting the child?"

Unequivocally, Pabst testified "I'm not concerned; I'm not concerned." Pabst testified that "[i]f Ashley for a second thought that her children were in any kind of threat or harm or danger with who she's with, she's out of there, she'll leave which is what she's proven before."

The trial court's findings as to this issue were not against the great weight of the evidence.

IV. FACTOR (L)

MCL 722.23(l) requires a trial court to consider, evaluate and determine: "Any other factor considered by the court to be relevant to a particular child custody dispute." The trial court's treatment of this issue spanned four pages of its opinion and order. Were it not so lengthy, I would recite it verbatim as evidence of the trial court's thoughtful consideration of the relevant facts.

The trial court was well aware of the pertinent issue:

> Plaintiff contends that the Defendant has chosen her boyfriend over [the child] and that she has not addressed her mental health issues as set forth by the psychologist in the psychological evaluation. Further, that she will not acknowledge that abuse or neglect occurred by the person she entrusted to care for her child, thus resulting in her daughter's death and that even if she were no longer with her boyfriend Mr. McCarthy, her judgment and ability to make important decisions regarding the care and well-being of [the child] is impaired.

The trial court then went on to review the concerns of the DHS workers and Dr. Mohr regarding the sister's cause of death. The trial court concluded:

> This court believes that Mr. McCarthy failed to keep a watchful eye on [HH], that as a result she accidently drowned, and he doesn't have the courage to admit it. Shame and guilt would naturally flow from such an event, and perhaps such emotions are too much for him to own up to. The court, however, does not draw the conclusion that his failure to admit fault compels the finding that the mother is an inappropriate custodial parent and whose home is an unsafe environment for [the child] given her age.

The lead opinion writes:

> The trial court's analysis of factor (l), a "catch-all" provision, reflects several fundamental misapprehensions of the trial evidence. The trial court found that neither Szczerowski nor Syjud explained how or why Correll should have "take[n] responsibility" for HH's death and found that had this message been effectively communicated, Correll would have parted ways with McCarthy. However, both witnesses worked closely with Correll following HH's death and both expressed concern that Correll never acknowledged or recognized that McCarthy's negligence likely caused HH's death. Syjud testified that Correll had voiced no regret about leaving HH with McCarthy, and declared that even in retrospect, she would do the same thing. [*Infra*, p 25.]

However, the lead opinion again impeaches on the trial court's credibility determinations. The mother testified that she was never told that she had to leave Matt. Both she and Pabst expressed that she would have done so.

The lead opinion further writes:

> The issues raised by Raczkowski with regard to factor (l) involved OR's safety if allowed to return to Correll and McCarthy's custody and care. . . .Although the trial court determined that McCarthy had not deliberately injured HH, it failed to address whether McCarthy's previous actions, including his admission to having assaulted his ex-girlfriend's partner and his failure to obtain medical care for HH, created a safety risk for OR. Given Correll's clearly stated intent to remain with McCarthy and to allow him to care for OR, factor (l) required the court to consider and carefully assess whether, given McCarthy's record of child neglect and violence, he could safely care for OR when tasked with this responsibility. [*Infra*, pp 26-27.]

I would first note that this child is not being returned to *McCarthy's* care; rather, in this custody dispute between a mother and a father, the issue before the trial court was the child's best interest as between placement with either *parent*. Additionally, the trial court absolutely understood that the seminal issue in this case was the child's protection and welfare and whether she would be safe in her mother's care. That the trial court's conclusion is not as the lead opinion would like is of no consequence.

The trial court's finding on this issue was not against the weight of the evidence.

V. WEIGHING THE FACTORS

Even if one or more of the above factors should have weighed in favor of the father, I note that "[a] court need not give equal weight to all the factors, but may consider the relative weight of the factors as appropriate to the circumstances." *Sinicropi v Mazurek*, 273 Mich App 149, 184; 729 NW2d 256 (2006). Throughout the trial court's opinion and order, one can see that the trial court feared granting the father custody where it was clear that the father was not adequately concerned with the child's emotional and mental health. In finding that factor (b) favored the mother, the trial court noted "the loss of two siblings has greatly impacted Olivia and it is clear to this court that the father does not appreciate the enormity of her loss and the absolute necessity of professional emotional intervention. He was in the position to do something about it and he did not and has not." This finding is supported by the record evidence.

The father initially testified that the child had not been in counseling because of insurance. But mother's counsel pressed the issue:

> *Q.* [by mother's counsel]. I'm going to hand you a document and see if that can refresh your memory as to the number of sessions total that Olivia has had in counseling?
>
> *A.* Okay.

Q. How many sessions total has Olivia had in counseling?

A. This, this paper right there says nine.

Q. Okay. Do you have any reason to dispute that?

A. No, ma'am.

Q. And so that would be two recently, seven sometime last year?

A. Okay.

Q. And so your, your statement is that you believe your insurance covers twenty?

A. Well, see we were doing our, our visits or sessions with our son, []. We were doing it at the same time for scheduling reasons to make it easier for everybody to be able to go. And his sessions were up and school was beginning so it was, it's just the way it worked out.

Q. Okay. So [he] didn't have --

A. Okay. [His] insurance didn't have any sessions left.

Q. So [the child] quit going?

A. Yes.

The trial court then pressed the issue:

THE COURT: Was it twenty visits a, isn't there twenty visits for each child?

THE WITNESS: Yes.

THE COURT: So you only went seven times out of twenty opportunities? Why?

THE WITNESS: She was doing well and it, it –

THE COURT: Do you have a written report from the counselor saying she was doing well and didn't need to come anymore?

THE WITNESS: I do not, sir.

THE COURT: So you made a decision yourself to stop?

THE WITNESS: Yeah, yes.

The father continued to explain his reasoning for not having the child in counseling, in spite of her kindergarten teacher's strenuous suggestion that it was needed:

> THE COURT: Just to make sure I've got, my notes are correct, Mr. Raczkowski, so you terminated the Center for Human Potential. So you went to CMH, and they said she doesn't need counseling?
>
> THE WITNESS: Correct.
>
> THE COURT: So there's no problem? She's suffering from no after-effects from the death of her siblings?
>
> THE WITNESS: Correct.
>
> THE COURT: Okay. And who was the counselor at Mental Health?
>
> THE WITNESS: I can't recall the name exactly. It started with a C.
>
> THE COURT: You don't know their name? Male, female?
>
> THE WITNESS: I believe it was a female.
>
> THE COURT: So you never met the person?
>
> THE WITNESS: No, I did not. The appointment was while I was at work.
>
> THE COURT: And how did she get there?
>
> THE WITNESS: My wife.
>
> THE COURT: Okay. and so do you know, we don't know, do we, if the counselor was given any background information as to what may or may not have been troubling [the child].
>
> THE WITNESS: Yes, my wife explained the situation to her.
>
> THE COURT: You weren't there so you don't know what the conversation was; do you?
>
> THE WITNESS: No, sir.
>
> THE COURT: And so after all that [the child's] been through, CMH, according to your wife, said that she has no need that need to be addressed?
>
> THE WITNESS: Correct.

This, in spite of the teacher's testimony that the child cried four out of five days a week, was extremely clingy, and was unable to make it through the day without a nap.

THE COURT: Okay. Are you concerned or troubled by the comments of her teacher, Karen Morin, who is with her, of course, hours every day, she probably spends more time with her than you for good reason because that's where she's at every day, that she felt grief counseling would be advisable because "she cried all the time and it would last for a long period and it definitely interfered with her education." Doesn't that concern you?

THE WITNESS: Yes, it does. But I also believe that her methods contributed to this behavior.

THE COURT: That Ms. Morin's did?

THE WITNESS: Correct.

THE COURT: What methods are those?

THE WITNESS: I believe, and the counselor at Community Mental Health also agreed with this, --

THE COURT: Oh, the counselor you never talked to?

THE WITNESS: Yes.

THE COURT: Okay. Go ahead.

THE WITNESS: -- that once you start showing a child that you can, you can exhibit this type of behavior and you'll get a result from this type of thing, that it will begin to be taken further and further and further.

I believe the record evidence compels this Court to affirm the trial court's findings and ultimate decision. I believe the lead opinion has substituted itself as fact-finder in contravention of this Court's function. I would affirm.

/s/ Kirsten Frank Kelly